COMMENTS

ADMINISTRATIVE AGENCY LAWYERS' PRESENCE IN THE GRAND JURY ROOM: RULES TO PREVENT ABUSE

Although the grand jury process is reserved for enforcement of criminal laws and may not be used as a subterfuge to obtain evidence for a civil or agency investigation,[1] it has become increasingly available to federal agencies for regulatory and civil enforcement. If the original grand jury investigation is initiated in good faith for only criminal enforcement purposes, then evidence developed by that jury may be used by an agency in subsequent or concurrent civil proceedings if the agency shows a "particularized need" for it.[2] Use in administrative proceedings is an unsettled question.[3]

The dangers of secret grand jury information leaking to federal agencies and of unauthorized agency use of that information have increased in recent years because of the asserted need for agency personnel to provide expertise and assistance to United States attorneys handling complex grand jury investigations. Since such technical assistance requires disclosure of grand jury materials to the agency personnel, rule 6(e) of the Federal Rules of Criminal Procedure—designed in 1945 to protect grand jury secrecy—posed a potential obstacle.[4] In response to conflicting decisions and requests for clarification from the courts,[5] the Supreme Court proposed an

[1] *See* United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958); *In re* April 1956 Term Grand Jury, 239 F.2d 263 (7th Cir. 1956); United States v. Doe, 341 F. Supp. 1350 (S.D.N.Y. 1972).

[2] Douglas Oil Co. of Cal. v. Petrol Stops Northwest, 99 S. Ct. 1667 (1979); United States v. Procter & Gamble Co., 356 U.S. 677 (1958).

[3] *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcommittee on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 92-93 (1977) (testimony of Prof. Wayne LaFave) [hereinafter cited as *Hearings*]; *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1317 (1979).

[4] The original version limited disclosure of grand jury matters to "attorneys for the government," which courts construed not to include agency experts or attorneys. *See, e.g., In re* Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962). The precise language of old rule 6(e) read in pertinent part: "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to attorneys for the government for use in the performance of their duties." FED. R. CRIM. P. 6(e).

[5] *See, e.g.*, Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1126 n.54 (E.D. Pa. 1976); *In re* William H. Pflaumer & Sons, Inc., 53 F.R.D. 464, 476 (E.D. Pa. 1971). For a comprehensive survey of the judicial

amendment to rule 6(e) that would permit disclosure to necessary agency assistants.[6]

After delaying implementation of the amendment and holding hearings, Congress apparently decided that the risk of unauthorized agency use of disclosed material was outweighed by the benefits of such technical assistance.[7] A modified, "compromise" [8] version of rule 6(e) was adopted in 1977 which (1) permitted agency assistance at the discretion of the government attorney who was prosecuting,[9] (2) required a record of all agency personnel so employed,[10] and (3) imposed a contempt sanction for breach of grand jury secrecy.[11]

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decisions which preceded the amendment of rule 6(e), see Note, *Administrative Agency Access to Grand Jury Material Under Amended Rule 6(e)*, 29 CASE W. RES. L. REV. 295, 297-314 (1978).

[6] The Supreme Court amendment to rule 6(e) inserted a new clause after the sentence quoted in note 4, *supra*: "For purposes of this subsection, 'attorneys for the government' includes . . . such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." COMMUNICATIONS FROM THE CHIEF JUSTICE OF THE UNITED STATES, H.R. DOC. No. 464, 94th Cong., 2d Sess. 1-2 (1976).

[7] *See Developments in the Law*, *supra* note 3, at 1319.

[8] Note, *supra* note 5, at 314.

[9] FED. R. CRIM. P. 6(e)(2)(A)(ii).

[10] *Id.* 6(e)(2)(B).

[11] *Id.* 6(e)(1). As amended, rule 6(e) provides in pertinent part:

Secrecy of Proceedings and Disclosure.

(1) General Rule.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) Exceptions.—

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

These were deliberate safeguards, included with the expectation of prohibiting such agency personnel from using the disclosed material for any purpose other than assisting the United States attorney.[12] The 1977 amendments were thus designed to facilitate the United States attorney's task of interpreting complex records and testimony: they were certainly not calculated to facilitate use of grand jury materials by federal agencies in civil matters. Indeed, subparagraph (2)(C)(i) of the amended rule continues the preexisting requirement that any subsequent use of grand jury material must be approved by a judge.[13]

Nevertheless, a recent flurry of litigation suggests that Congress's 1977 amendments did not close off all avenues of abuse. The recent cases demonstrate that another way agency personnel can obtain access to the grand jury is by appointment as special attorneys to assist in conducting the proceeding itself.[14] The United States attorneys have made such appointments under 28 U.S.C. § 515(a), which allows "any attorney specifically appointed" to "conduct any kind of legal proceeding, . . . including grand jury proceedings."[15] Cases challenging such appointments have thus had to address not only rule 6(e), but also this section 515(a) appointment power.

In one such case the court observed, "Although the propriety of [administrative] agency attorneys appearing before the grand jury as special assistant U.S. attorneys has been frequently questioned in recent months, the question has not yet been conclusively resolved. It is of considerable importance to the administration of criminal justice."[16] Still, that court, along with at least two

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(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

. . . .

(ii) When permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

Id. 6(e).

[12] *Id.* 6(e)(2)(B).

[13] FED. R. CRIM. P. 6(e)(2)(C)(i).

[14] United States v. Birdman, No. 78-1940 (3d Cir. June 25, 1979); *In re* Perlin, 589 F.2d 260 (7th Cir. 1978); *In re* April 1977 Grand Jury Subpoenas, 573 F.2d 936, *rev'd en banc*, 584 F.2d 1366 (6th Cir. 1978), *cert. denied*, 99 S. Ct. 1277 (1979); United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979); United States v. Dondich, 460 F. Supp. 849 (N.D. Cal. 1978).

[15] 28 U.S.C. § 515(a) (1976).

[16] *In re* Perlin, 589 F.2d 260, 262 (7th Cir. 1978) (footnote omitted).

others,[17] held that the appearance of an agency lawyer before a grand jury investigating alleged violations comparable to those investigated by the lawyer within his agency, even when the lawyer himself had recommended the criminal prosecution, was not an abuse of the grand jury. These decisions are troubling because they construe the recent amendments to rule 6(e)—which Congress carefully designed to provide controlled agency access to grand jury materials —as support for granting access to the grand jury room itself.

The central thesis of this Comment is that the physical presence of agency attorneys in the grand jury room and their actual conduct of the proceedings pose risks of abuse different in kind and magnitude than those accepted by Congress when it allowed mere disclosure of grand jury records and transcripts. Proper analysis of the agency attorney as special attorney must, it is suggested, begin with rule 6(d), which expressly limits who may be present and does not directly mention agency attorneys.[18] Recent cases in which the presence of an agency attorney was challenged but upheld, however, have completely ignored this section and looked solely to rule 6(e), thereby confusing presence with disclosure. This Comment will show that, at the least, Congress did not intend that its rule 6(e) amendments would affect rule 6(d). It foresaw United States attorneys drawing on the expertise of agency lawyers, but not using them in their stead as prosecutors. This Comment suggests that, to clarify the law, new rules be drafted that would exclude all but necessary and appropriate agency attorneys from the grand jury room. Such rules would seek to balance the competing policies of effective criminal investigation and grand jury secrecy,

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[17] United States v. Birdman, No. 78-1940 (3d Cir. June 25, 1979); United States v. Dondich, 460 F. Supp. 849 (N.D. Cal. 1978).

[18] Rule 6(d) provides:

> Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

FED. R. CRIM. P. 6(d). The term "attorneys for the government" is defined in rule 54(c):

> Application of Terms. As used in these rules the following terms have the designated meanings. . . . "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein. . . .

FED. R. CRIM. P. 54(c).

producing a compromise similar to the one achieved in the amended rule 6(e).

I. Agency Motivation: An Introduction

Why agency lawyers want to be present at grand jury proceedings depends, of course, upon the circumstances. When the agency lawyer has initiated the investigation by suggesting it to the Justice Department, his motives may run from a personal vendetta [19] to an interest in seeing the investigation carried out correctly. Another motive, however, is suggested by the extraordinary investigatory powers available to the grand jury.[20] The temptation for an agency to recommend grand jury investigations with the hope of getting information useful for its regulatory and civil activities would seem substantial, especially when the target of an administrative investigation has successfully resisted an agency's own subpoenas.[21]

A. *Agency and Grand Jury Powers Compared*

Not only do grand jury subpoenas receive little judicial scrutiny, but a witness before a grand jury also enjoys few protections while testifying; [22] further, the investigation need not concentrate on a specific target. Such powers may be viewed as tempered by the requirement that an indictment be issued by the defendant's peers,[23] by the seriousness with which society views criminal behavior, by the opportunity the defendant has for vindication at trial, and by the policy of secrecy which protects innocent targets who are not indicted from disclosure to the public that they were suspected.

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[19] *See* Address by Attorney General (later Supreme Court Justice) Jackson, Second Annual Conference of United States Attorneys (April 1940), *quoted in* M. Frankel & G. Naftalis, The Grand Jury, An Institution on Trial 58 (1977).

[20] United States v. Calandra, 414 U.S. 338, 343 (1974); United States v. Johnson, 319 U.S. 503, 510 (1943). *See* Note, *Administrative Agency Access to Grand Jury Materials*, 75 Colum. L. Rev. 162, 176-78 (1975).

[21] Agency subpoenas are appealable. The agency will be required to show "(1) that the investigation will be conducted pursuant to a legitimate purpose, (2) that the inquiry may be relevant to the purpose, (3) that the information sought is not already within the [agency's] possession, and (4) that the administrative steps required by [Congressional guidelines] have been followed." United States v. Powell, 379 U.S. 48, 57-58 (1964). Under this standard, many agency subpoenas have been successfully resisted. *See, e.g., In re* Grand Jury Subpoenas, April, 1978, at Baltimore, 581 F.2d 1103, 1106 (4th Cir. 1978), *cert. denied*, 99 S. Ct. 1533 (1979).

[22] United States v. Mandujano, 425 U.S. 564 (1976); Fed. R. Crim. P. 6(d). *But see U.S. Considers a Grand Jury Switch*, Nat'l L.J., Nov. 6, 1978, at 3, col. 1.

[23] *See* Costello v. United States, 350 U.S. 359 (1956).

None of these compensating factors or safeguards applies to agency investigations. The regulatory activities of the agencies, for example, unlike those of the United States attorney in connection with a given prosecution, are ongoing, so that vindication at trial does not serve as a meaningful protection in cases of abuse.[24] The potential for harassment, short of litigation, thus presents a problem.[25] Congress has determined, therefore, not to give administrative agencies investigatory powers comparable to those of the grand jury.[26] Because of this disparity, the Supreme Court decided long ago that use of the grand jury for solely administrative investigative purposes "flouted the policy of the law." [27] One commentator articulated the rationale:

> To the extent that access is gained to information unobtainable by the use of the agencies' own investigative procedures, the limits on agency power which Congress sought to build into the statutes are circumvented. . . .
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> Aside from congressional policy, restrictions on agency investigations are fundamental to our liberties. The grand jury is properly an arm of the court, not the executive. The agencies are denied unrestrained inquisitorial powers comparable to the grand jury's, because that kind of power should not be vested in the executive branch. Expansion of agency power through indirect access to grand jury material permits the executive to wield such power.[28]

Such concerns are enhanced when one considers the recent exploitation of executive agencies in the Nixon Administration, which used them to harass and punish political enemies of the President.[29] Grand juries were similarly used.[30] In light of such abuses, it would seem unwise indeed to expand the powers of agency investigation or to facilitate the conjunctive use of grand juries and agencies as political weapons.

A subsidiary, but nonetheless significant, objection to use of the grand jury for civil investigation is that it erodes the secrecy essential to grand juries, making the witness less willing to testify

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[24] *Hearings*, *supra* note 3, at 33 (testimony of Hon. Edward R. Becker).

[25] *Id.* 181 (statement of Phylis S. Bamberger).

[26] For a comprehensive comparison of the powers of grand juries and administrative agencies, see Note, *supra* note 20, at 175-83.

[27] United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958).

[28] Note, *supra* note 20, at 178-79 (footnotes omitted).

[29] *Id.*

[30] *See, e.g.*, L. CLARK, THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER (1975).

openly. To the extent that witnesses fear that their testimony may be used collaterally by a federal agency, their inhibitions are likely to increase.[31]

B. *The Problem*

Despite these apparent dangers, some practicing lawyers continue to suspect that agencies recommend grand jury investigations with the hope of indirectly getting information useful for their regulatory and civil activities.[32] The technique seemed so apparent to Justice Whittaker that he remarked, "[I]t is obvious that such could be, and probably has often been, the real purpose of grand jury investigations."[33] What seems, at first, to be a Machiavellian hypothesis, gains further credence if the claims of defendants in recent cases are at all credible; in them, the defendants found themselves being investigated by the same agency attorney in concurrent administrative and grand jury proceedings.

Some hard evidence of "subterfuge" was uncovered, for example, in *In re April 1977 Grand Jury Subpoenas* ("General Motors").[34] In *General Motors,* following the company's refusal to submit to certain discovery, an attorney for the Internal Revenue Service recommended to the Justice Department that a grand jury investigation be undertaken. The attorney made clear in a letter that the Service intended to seek access to evidence produced by the grand jury for use in its concurrent civil proceedings.[35] In the

[31] *Developments in the Law, supra* note 3, at 1313.

[32] *See, e.g., Hearings, supra* note 3, at 152 (testimony of Bernard J. Nussbaum); *id.* 181 (statement of Phylis S. Bamberger).

[33] United States v. Procter & Gamble Co., 356 U.S. 677, 684 (1958) (Whittaker, J., concurring).

[34] 573 F.2d 936, *rev'd en banc,* 584 F.2d 1366 (6th Cir. 1978), *cert. denied,* 99 S. Ct. 1277 (1979).

[35] The case of *In re* Grand Jury Subpoenas, April, 1978, at Baltimore, 581 F.2d 1103 (4th Cir. 1978), *cert. denied,* 99 S. Ct. 1533 (1979), also raises suspicions of subterfuge. The defendants found it suspicious that they received grand jury subpoenas soon after they had successfully quashed an IRS summons for the same records. To buttress their allegation of bad faith, the defendants introduced into evidence part 9267.4 of the *Internal Revenue Manual,* which until November 1977 stated as a general practice recommendation of a grand jury investigation when an administrative *criminal* investigation was stymied. The Fourth Circuit Court of Appeals refused to infer from this any illicit motive by the IRS in its *civil* investigations. 581 F.2d at 1107 n.9.

While the defendants' claim was, indeed, speculative, the court was perhaps too hasty in its dismissal of this evidence. The manual set forth the IRS's awareness of the disparity between the grand jury's investigatory powers and its own. The Service was certainly aware then that grand juries might profitably, if not legitimately, be used for civil investigations.

The IRS recently reviewed its relationship with grand juries and again sanctioned the practice of recommending them when "[i]t is apparent that the

one case where an indictment has been dismissed because of agency abuse, *United States v. Gold*,[36] an Environmental Protection Agency attorney actually used material that he had uncovered as a special attorney in a grand jury investigation to influence as administrative law judge's decision in a concurrent proceeding. Similar accusations have been made in *In re Perlin*[37] and *United States v. Birdman*,[38] in which the propriety and wisdom of appointing agency lawyers to conduct grand jury proceedings were again challenged, but without success.

This pattern of accusation and denial suggests that agencies may indeed view the grand jury as a potential tool for gathering information with important civil uses. Rule 6(e) has made clear, though, that an agency's subsequent, derivative use of grand jury evidence without judicial consent is unlawful.[39] The law has not made clear enough, however, that the direction and control of the grand jury during the proceedings must remain firmly with the United States attorney, or else a new kind of grand jury abuse may develop. The problem arises when a grand jury is legitimately convened but an agency lawyer serving as special attorney is able to divert or broaden its inquiry to elicit information relevant to civil or regulatory matters which that lawyer directs back at the agency. The interposition of a neutral magistrate at the appointment stage is needed in order to screen agency lawyers' access to the grand jury proceeding and thereby prevent the United States attorney from becoming a tool of the agency.[40]

II. Evolution of the Case Law

A. *The "Appearance of Impropriety"*

The first case to discuss agency involvement with grand juries was *General Motors*,[41] in which the Justice Department, evidently upon the recommendation of an IRS lawyer, authorized a special grand jury to investigate possible criminal tax violations by General Motors.[42] After the district court refused to disqualify the IRS

administrative process cannot develop the relevant facts within a reasonable period of time . . . ." [1979] 5 Internal Revenue Manual (CCH) pt. 9267.2(1)(a).

[36] 470 F. Supp. 1336 (N.D. Ill. 1979).

[37] 589 F.2d 260 (7th Cir. 1978).

[38] No. 78-1940 (3d Cir. June 25, 1979).

[39] Fed. R. Crim. P. 6(e)(2)(C)(i).

[40] *Hearings, supra* note 3, at 152 (testimony of Bernard J. Nussbaum).

[41] 573 F.2d 936, *rev'd en banc*, 584 F.2d 1366 (6th Cir. 1978), *cert. denied*, 99 S. Ct. 1277 (1979).

[42] 573 F.2d at 938.

lawyer, Judge Weick writing for the court of appeals, reversed. Although the judge found that "[n]othing precluding such an appointment is found in the Federal Rules of Criminal Procedure" [43] and that agency lawyers were "attorneys for the government" for purposes of rule 6(d), he held instead that the lawyer should be disqualified for violating canon 9 of the Code of Professional Responsibility, which states, "A lawyer should avoid even the appearance of professional impropriety." [44] A conflict existed, said the judge, because the agency attorney's interest naturally lies in justifying the agency's recommendation that the case be referred for criminal investigation. Indeed, the IRS lawyer had disclosed a clear intention to utilize grand jury materials to that end,[45] thereby creating the apperance of a conflict of interest. This apperance, said Judge Weick, limited the power of the Attorney General to appoint special assistants.[46]

On rehearing the case *en banc,* the Sixth Circuit reversed on procedural grounds.[47] Dissenting, Judge Weick presciently noted that "[i]t appears that the appointment of an agency attorney as a Special Attorney to conduct a grand jury investigation in a matter which the agency attorney has instigated, and in which he had been previously involved, is not an isolated incident." [48] He contended this time that the agency lawyer's involvement compromised the prosecutor's impartiality,[49] creating a conflict of interest that violated the constitutional guarantee of a fair trial.

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[43] *Id.*

[44] ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon No. 9.

[45] 573 F.2d at 942.

[46] *Id.* 943.

[47] 584 F.2d 1366 (6th Cir. 1978) (en banc).

[48] *Id.* 1381-82. This was practically admitted by government counsel, who defended the propriety of such a practice in an exchange with the district judge. Judge Weick recorded the transcript in his opinion, 584 F.2d at 1374:

> The COURT: Why can't you take any Internal Revenue Service lawyer and make him a special attorney by appointment and turn the grand jury investigation over to him, let him run the whole show?
>
> [Government Counsel]: Conceivably that could be done.
>
> The COURT: You are saying that would be appropriate?
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> [Government Counsel]: Yes, your honor . . . .

Judge Weick supported his position by citing two cases, United States v. Braniff Airways, Inc., 428 F. Supp. 579 (W.D. Tex. 1977), and United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979). Indeed, Judge Weick noted that "[t]his is one of the most important cases ever to be presented to an appellate court for review." 584 F.2d at 1373.

[49] *Id.* 1382-84.

Objections based on the "inherent conflict of interest" or "appearance of impropriety" have been raised repeatedly in post-*General Motors* challenges to the presence of agency attorneys in grand jury proceedings. With the exception of *United States v. Gold*,[50] however, other courts have rejected this line of argument, citing with approval Judge Orrick's observation in *United States v. Dondich*, that "to the extent that [the SEC attorney] did have an interest in seeing the [criminal] investigation produce a successful prosecution, it is unclear in what way he differs from any other zealous prosecutor." [51]

Even if Judge Weick's theories of impropriety and unconstitutionality are unconvincing, there remain the statutory problems raised when an agency attorney assumes a prosecutorial role inside the grand jury room. What Judge Weick so summarily accepted—that the Attorney General has the power to bring agency lawyers within the definition of "attorneys for the government" for purposes of rule 6(d), thereby permitting them inside the grand jury room—has been the subject of more discussion in other courts. The central thesis developed in these subsequent decisions is that such power was granted by the 1906 statute authorizing the appointment of special attorneys,[52] and that the new protections of rule 6(e) were adequate to "sanitize" [53] the presence of agency attorneys at the grand jury proceedings.

B. *Construing Rules 6(d) and 6(e)*

The first indication that rule 6(e) would be construed to insulate from judicial scrutiny all forms of agency participation in grand jury investigations came in *In re Grand Jury Subpoenas, April, 1978, at Baltimore* [54] (decided before the final *General Motors* decision) which set forth a mere "good faith" standard. The grand jury investigation at issue began after the defendant successfully resisted an IRS summons. Judge Winter noted that "several agents previously involved in the administrative investigation [were] deputized for the grand jury probe. The subpoenas then served by the grand jury sought the same materials which the IRS had unsuccessfully attempted to obtain administratively." [55] The de-

[50] 470 F. Supp. 1336 (N.D. Ill. 1979). *See* text accompanying notes 157-58 & 170-74 *infra*.

[51] 460 F. Supp. 849, 853 (N.D. Cal. 1978).

[52] 28 U.S.C. § 515(a) (1976). *See* text accompanying note 15 *supra*.

[53] *In re* Perlin, 589 F.2d 260, 267 (7th Cir. 1978).

[54] 581 F.2d 1103 (4th Cir. 1978), *cert. denied*, 99 S. Ct. 1533 (1979).

[55] *Id.* 1107-8.

fendant, therefore, claimed the grand jury was used "as a subterfuge for gaining access to documents IRS need[ed] in its pending civil and criminal investigation of [the defendant]." [56] The issue in the case, therefore, became motive. The district court relied on an affidavit by an IRS special agent "explaining the decision to initiate a grand jury investigation by pointing to the imminence of the bar of limitation." [57] The court of appeals agreed that it was sufficient, during the course of the grand jury's proceedings, "to rely on the government's own affirmations of good faith," [58] especially since defendant's interests were fully protected by the provisions of rule 6(e). The Fourth Circuit reasoned that the 1977 amendments expressly permitted disclosure to agency personnel for the purpose of assisting the United States attorney,[59] as well as subsequent disclosure to federal agencies if the grand jury materials were released by a judge.[60] The former is controlled by the threat of contempt for unauthorized use while the latter requires a court order predicated upon a demonstration of good faith.[61] The court concluded "Any abuse of the grand jury process can be dealt with effectively at another time and in another manner." [62]

It is unclear whether the IRS assistants in this case actually appeared before the grand jury. The first case to hold expressly that agency attorneys could participate in the proceeding itself was *In re Perlin*,[63] which upheld the practice on both ethical and statutory grounds. In that case an attorney for the Commodities Futures Trading Commission (CFTC), Koblenz, who had worked on agency investigations of the "soybean pit" of the Chicago Board of Trade, referred materials relating to criminal violations to the United States attorney's office in Chicago. Shortly thereafter, because the CFTC and the Justice Department "were conducting parallel investigations," [64] Koblenz was appointed special assistant United States attorney. When the United States attorney began an investigation of trading in the silver pit, Koblenz gave reports of the grand jury's findings to the Justice Department, to his immediate supervisor at the CFTC, and to the director of the CFTC Divi-

[56] *Id.* 1108.
[57] *Id.* 1108 n.10.
[58] *Id.* 1108.
[59] FED. R. CRIM. P. 6(e)(2)(A)(ii).
[60] *Id.* 6(e)(2)(C)(i).
[61] 581 F.2d at 1110.
[62] *Id.*
[63] 589 F.2d 260 (7th Cir. 1978).
[64] *Id.* 262.

sion of Enforcement. Perlin, the appellant, was called before the grand jury to answer questions about his trading in silver, but he was evidently also asked about soybean trading, in which there was an ongoing administrative proceeding.[65] Despite a grant of immunity, Perlin refused to testify. Acting upon claims that the grand jury was tainted by the presence of Koblenz and the large number of disclosees in the CFTC, the trial judge held an evidentiary hearing into possible abuse of the grand jury and ruled that there was "no evidence that the receipt of [information] was used to in any manner assist in the civil litigation . . . ." [66]

In a per curiam decision, the Seventh Circuit upheld Koblenz's participation in the grand jury proceeding as proper.[67] In considering the effect of rule 6, the court said that "[t]here is no question that a Special Assistant U.S. Attorney is an 'Attorney for the government' "; [68] it follows that agency participation in the grand jury was validated by rule 6(e)(2)(A)(i), allowing "disclosure . . . [to] be made to an attorney for the government for use in the performance of such attorney's duty." [69] That subsection, however, merely "validates" disclosure of grand jury materials; it was not intended to open the door to all forms of "agency participation," and legislative history [70] nowhere suggests that the 1977 amendments modifying rule 6(e) were meant to affect other safeguards contained in other sections of the rule.

Thus, actual presence in the grand jury proceedings continues to be regulated by rule 6(d),[71] yet neither the parties nor the court in *Perlin* seemed to notice that section's relevance to the issue of Koblenz's appearance before the grand jury. Without distinguishing between disclosure of records and access to proceedings, the court mistakenly used rule 6(e) as the test for grand jury presence:

> [Perlin] complains first that Koblenz is an improper person in the grand jury room, whose presence required the grand

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[65] *Id.* 262-63. Although it is true that the United States attorney, not Koblenz, asked the questions on soybean trading, the basic problem of abuse may still be present. The agency lawyer may have prompted the questions; further, he was present and in a position to ask follow-up questions.

[66] *Id.* 263.

[67] For a discussion of the first ground relied on by the court, the appointment power of the Attorney General under 28 U.S.C. § 515(a), see text accompanying notes 98-103 *infra.*

[68] 589 F.2d at 266. In fact, this premise is not self-evident and deserves closer examination. *See* text accompanying notes 123-41 *infra.*

[69] FED. R. CRIM. P. 6(e)(2)(A)(i).

[70] *See* text accompanying notes 98-122 *infra.*

[71] For the text of rule 6(d), see note 18 *supra.*

> jury's dissolution, because he brought no special skills to the investigation, and is thus not a proper "disclosee" under Rule 6(e). To the extent that prior cases required a showing of "particularized need" for disclosure to agency personnel, they have been superseded by the amendments to Rule 6(e).[72]

Ignoring the underlying caution and limited scope of the 1977 amendments and viewing rule 6(e)'s threat of contempt for unauthorized disclosure as a "sufficient safeguard," [73] the court concluded that "[r]ule 6(e) sanitizes the appearance of an agency attorney before the grand jury, once his is appointed a Special Assistant U.S. Attorney." [74] As will be shown later, the legislative history in fact provides no basis for this conclusion.[75]

The court acknowledged that disclosure to Koblenz and, through him, to his superiors in the CFTC Division of Enforcement, increased the risk of leakage into ongoing civil investigations, but it found no indication that such leaks had actually occurred; it thus felt that a per se rule against use of agency attorneys to conduct grand juries would be "an act of needless caution." [76]

The thesis that the protections of rule 6(e) are adequate to "sanitize" the presence of agency attorneys at grand jury proceedings produced similar results in the Ninth Circuit, in *United States v. Dondich*,[77] and in the Third Circuit, in *United States v. Birdman*,[78] the facts of which parallel *Perlin* very closely.[79] *Dondich* illustrates the imprecision with which courts have used the legislative history of the 1977 amendments. Relying on the Senate Judiciary Committee Report,[80] Judge Orrick concluded, "These passages signal that both the Congress and the Supreme Court support active participation by agency attorneys in grand jury investiga-

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[72] 589 F.2d at 266.

[73] *Id.* 268.

[74] *Id.* 267.

[75] *See* text accompanying notes 108-22 *infra.*

[76] 589 F.2d at 268.

[77] 460 F. Supp. 849 (N.D. Cal. 1978).

[78] No. 78-1940 (3d Cir. June 25, 1979).

[79] In *Birdman* a senior staff attorney for the Securities and Exchange Commission referred an investigation to the Justice Department, which in turn designated him its special attorney authorized to conduct the grand jury proceedings. He remained on the SEC's payroll and continued to act as an SEC attorney in related administrative matters. *Id.*, slip op. at 3.

[80] S. REP. No. 95-354, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 531.

tions." [81] The unstated and erroneous premise is that Congress's expressed interest in interagency cooperation affected rule 6(d).[82] Judge Orrick did concede that if the IRS indeed sought to use "the grand jury proceeding as a short cut to goals otherwise barred or more difficult to reach," then it might be appropriate to halt a civil proceeding which had improperly benefited from the grand jury investigation.[83] He expressly refused, however, to say that such abuse would be grounds for disqualification of the agency attorney.[84]

In only one recent case, *United States v. Gold*,[85] has a court found an agency attorney's presence in the grand jury room to be unauthorized. Although the court reached a proper result, its ad hoc treatment fails to grapple with the statutory arguments for and against such a practice, perhaps because Judge Leighton felt bound by his circuit's disposition of the statutory issues in *Perlin*. The result is an opinion which exhaustively chronicles the facts and devotes comparatively little discussion to the law.[86]

Gold held that an Environmental Protection Agency attorney, simultaneously conducting a grand jury investigation as a special attorney and participating in a parallel administrative proceeding involving the same defendant, labored under a conflict of interest which made him an unauthorized person in the grand jury room. This conclusion amounts to a judge-made gloss on rule 6(d), and, indeed, no direct citation to that section appears in this part of the court's opinion.[87] *Gold* does, however, signal that the *Perlin* line of cases rejecting a per se rule does not preclude objectors from successfully showing extreme agency abuse at a full evidentiary hearing.[88]

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[81] 460 F. Supp. at 856.

[82] *See* text accompanying notes 98-122 *infra*.

[83] *Id.* 858.

[84] *Id.*

[85] 470 F. Supp. 1336 (N.D. Ill. 1979).

[86] For a more thorough discussion of *Gold*, see text accompanying notes 157-58 & 170-74 *infra*.

[87] Rule 6(d) is relied on in another section of the opinion that criticizes the EPA attorney for appearing as a witness at the same time as he was serving as prosecutor. The court was able to rely on cases holding rule 6(d) prohibits a witness from remaining in the grand jury room after his testimony and was, therefore, breached when the attorney stayed on as a prosecutor. 470 F. Supp. at 1351-52.

[88] *Id.* 1346. An interesting sidelight to *Gold* is that the record in that case suggests a change in the views of Judge Parsons, whose district court decision to permit an agency attorney into the grand jury was upheld in *Perlin*. Whereas Judge Parsons held an evidentiary hearing into the allegations of abuse in that

C. *The Danger of Prospective Abuse*

In refusing to announce a per se rule against agency attorneys conducting grand jury investigations, the courts in *Perlin, Dondich,* and *Birdman* were perhaps toppling a straw man. This Comment does not advocate such a stringent precaution because complex cases may arise that actually require agency expertise in the conduct of proceedings, and carefully drafted rules, like those proposed in this Comment,[89] can prevent serious abuses. The fact remains, however, that courts which have addressed the issue so far have remained indifferent or unaware of the new, special risks posed when agency attorneys serve a prosecutorial role as appointed special attorneys. That practice creates not only the risk of disclosure of evidence developed by the grand jury but also the risk of an agency actively developing the grand jury evidence.

This distinction may be illustrated by reference to *Perlin.*[90] In that case Special Attorney Koblenz was careful not to allow other CFTC employees access to his materials. Following procedures suggested by earlier court decisions,[91] he placed grand jury materials in a safe and had the investigative staff sworn to secrecy as agents of the grand jury.[92] The leakage which rule 6(e) is designed to prevent was controlled under such circumstances. None

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case and found none, 589 F.2d at 263, he did not think it looked proper for the EPA attorney in the *Gold* litigation to request permission to disclose documents to his agency while he was serving as a special assistant in the grand jury investigation. Judge Parsons's reaction during the hearing on this request is quoted by Judge Leighton in his Findings of Fact in *Gold*:

> It doesn't look good, even if nothing happened that was untoward, I think that it looks wrong, it just looks wrong. It has the imprint of impropriety for a matter to come here to be presented to the Grand Jury of the Northern District of Illinois about an environmental problem concerning which there is an administrative agency which is not a part of the judicial, administrative agency that is a part of the executive branch of the government, carrying on its own investigation and proceedings before a hearing body, a hearing officer, and then to have the United States Attorney for the Northern District of Illinois come in and have join with him the attorney for the administrative agency [Mr. Kennedy] as co-attorney to present the matter to the grand jury, aware of the fact that that would involve disclosures or the possibility of disclosures in advance of court orders [or] disclosures that would have to be assumed under the first provision of Rule 6(e), and I think that it just doesn't look good.

Findings of Fact at 69 (No. 77-CR-1073) (unpublished).

[89] *See* text accompanying notes 153-74 *infra.*

[90] 589 F.2d 260 (7th Cir. 1978).

[91] *See, e.g.,* Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976).

[92] 589 F.2d at 262.

of these precautions, however, limited Koblenz's own ability to lead the grand jury into other areas in which the CFTC might have interests, or to use whatever new knowledge he gained in subsequent CFTC work. This potential for prospective manipulation of grand jury materials afforded by the appointment of an agency attorney to conduct a grand jury is the crux of the problem. Unfettered by any rules of relevance or materiality, agency lawyers can engage in extremely broad inquiries, for they will be searching for information of potential future use as well as information relevant to the present investigation.[93] For example, an EPA lawyer investigating the likely origin of pollutants may now be able to ask far-ranging questions of industry representatives under the pretext of investigating the alleged pollution. Similarly, an SEC lawyer, aiding the United States attorney's investigation of foreign bribes will be privy to information about a corporation which might subsequently be under his regulatory authority.

This magnified investigatory power can be enjoyed inadvertently as well as plotted in advance. A grand jury witness who is unaware that he is speaking to an agency lawyer whose ordinary duties are regulation of the witness's industry is likely to disclose information that he might otherwise keep to himself. When the agency lawyer returns to his usual work and acts on that accidentally gained knowledge, the processes of the grand jury have been abused.[94]

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[93] To be sure, such prospective abuse has yet to surface with any frequency in the courts. Still, it is a very real problem: considering the occasional insensitivity of agency lawyers to the distinction between agency and grand jury investigations, *see, e.g.*, text accompanying notes 170-74 *infra*, it is not difficult to envision future civil or administrative proceedings in which the defendant objects that evidence used against him was obtained by an agency lawyer conducting a "fishing expedition" as a special assistant to a grand jury investigation.

[94] One member of the House Subcommittee on Criminal Justice, who foresaw risks even in amending rule 6(e) to allow disclosure to experts, posed the problem vividly in a discussion with Judge Robb during the 1977 hearings on rule 6(e):

> Mr. HYDE: . . . Once this IRS fellow has sat there and learned that the president of the ABC Co. is not reporting all of the income, he then tiptoes back to the IRS and how does he expunge that from his mind? . . .
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> . . . .
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> . . . .
>
> Judge ROBB: . . . [Y]ou would treat [that] just as though it was information received through an unlawful wiretap or an invalid search and seizure.
>
> Mr. HYDE: I appreciate that if the source of the information is ever known. It could be done inadvertently. It could be not necessarily malicious or anything. An IRS agent is an IRS agent.

Hearings, supra note 3, at 87.

Once the relevant evidence has been developed or stumbled upon, agency lawyers can—if they bother to—petition a judge to release it for use in a subsequent or concurrent civil proceeding pursuant to rule 6(e)(2)(C)(i). If need for the "release" were shown,[95] the onus would then be upon the defendant to show that the agency lawyer's first involvement in the grand jury proceeding was motivated by a bad faith desire to develop the evidence subsequently applied for by the agency.[96] More realistically, the agent might never petition for release of the grand jury materials because he already knows their contents. Several experts testifying during the hearings on the 1977 amendments agreed that agency personnel could "go back and work on a civil case without getting the grand jury transcripts . . . and have all the benefit of that information which should have been secret before the grand jury." [97]

Although this prospective abuse ought to be punishable by contempt, there is no guarantee that it will or ever could be. The agency lawyer's broadened knowledge of the defendant might never be disclosed to anyone else within the agency, so, strictly speaking, the lawyer will have maintained the secrecy of the grand jury. Although subparagraph (2)(B) of rule 6(e) prohibits agency personnel enlisted as technical assistants under subparagraph (2)(A)(ii) from outside use of evidence developed by the grand jury, the rule does not make clear that this same stricture applies to agency lawyers appointed as special attorneys. Even if it does, a defendant alleging that evidence used against him in a civil proceeding was derived by a special attorney from a grand jury investigation might face a difficult problem of proof. It would be difficult to establish whether suspicions leading to investigation were prompted by the agency lawyer's experience in the grand jury or by independent investigative efforts. As long as courts continue to make the error of using the new rule 6(e) to legitimize the presence of agency attorneys in the grand jury room, without attention to limitations contained in rule 6(d), this expanded potential for prospective abuse of the grand jury will go unchecked.

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[95] For a discussion of the "particularized need" requirement and its current vitality, see Note, *supra* note 5, at 321-25.

[96] *See In re* William H. Pflaumer & Sons, Inc., 53 F.R.D. 464, 477 (E.D. Pa. 1971); United States v. Pennsalt Chem. Corp., 260 F. Supp. 171, 174-80 (E.D. Pa. 1966); Note, *supra* note 5, at 311; *Developments in the Law, supra* note 3, at 1314.

[97] *Hearings, supra* note 3, at 24 (testimony of Terry Philip Segal); *see also id.* 153 (testimony of Bernard J. Nussbaum).

III. Assistance Inside and Outside the Grand Jury Room Compared

At first glance, it might seem that the dangers of prospective abuse and the difficulties of enforcement are equally present when agency agents and experts merely gain access to grand jury materials by providing technical assistance outside the grand jury room. If so, allowing agency attorneys to conduct the proceeding itself as a special attorney would not be significantly different. Several factors, however, caution against making such assumptions.

A. *The Effects of High Status*

For example, the potential for abuse may seem greater when agency attorneys are allowed, in effect, to "prosecute" because such attorneys likely occupy higher positions of authority within the agency than the routine investigative agents, accountants, and handwriting experts whom the framers of the new rule 6(e) had in mind.[98] Higher positions imply correspondingly more independence and power to use information developed by the grand jury for a variety of regulatory and policymaking purposes without necessarily having to disclose the source of such information or justify one's suspicions. To the extent that agency attorneys now being permitted to participate in the grand jury process can return to their agencies and direct on their own initiative that files be opened, investigations commenced, settlements negotiated, or policy formulated vis-à-vis a particular company or industry, grand jury materials can be used in a variety of subtle ways, consciously or unconsciously, without the need actually to disclose such information to superiors in clear violation of rule 6(e)(1).

During consideration of the 1977 amendments, such silent abuses were feared in the context of the IRS,[99] probably in part because the same IRS agents who might give technical assistance also had this capacity to initiate investigations and manage a caseload. The circumstances of *United States v. Gold*[100] suggest, however, that the participation of agency attorneys in grand juries promises to involve other federal agencies as well. The attorney in *Gold* retained his position at EPA and, while helping to conduct a grand jury inquiry into Velsicol Corporation, simultaneously represented EPA publicly on related matters. For example, he represented EPA at a meeting concerning a contract related to an administra-

[98] *See, e.g., id.* 29, 37 (testimony of Hon. Edward R. Becker); *id.* 86, 89 (testimony of Prof. Wayne LaFave).

[99] *See* note 97 *supra* & accompanying text.

[100] 470 F. Supp. 1336 (N.D. Ill. 1979).

tive proceeding against Velsicol and concerning the same pesticides at issue before the grand jury. He also represented the agency at a meeting with representatives of the National Agricultural Chemicals Association, at which was discussed the meaning of the EPA regulation involved in the grand jury case.[101] Indeed, the lawyer's advancement at EPA "depended on the commendation and approval he received from his superiors at EPA, to whom he was under orders to report at least once each week."[102] Thus, the lawyer's activities in *Gold* may contain a larger policymaking component, involve more public exposure, and present more temptations for an ambitious young staff attorney to capitalize on grand jury evidence than would the activities of a lower-level, and perhaps more obedient, investigator or documents analyst of the type Congress may have thought it was dealing with when it amended rule 6(e).[103]

B. *The Distinction Between Inside and Outside*

Leaving aside distinctions made in terms of status and subsequent use, others have argued that agency assistants working outside the grand jury have almost as much opportunity to manipulate the grand jury questioning as do those actually conducting the proceeding.[104] According to this view, any additional potential for abuse posed by having agency attorneys appear before the grand jury is "slight," because the assistant outside the room merely has to suggest and frame questions for the prosecuting attorney to ask to probe areas that might produce important civil results.

Although the outside assistant may in theory be in a position to influence the questioning, in practice a United States attorney

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[101] *Id.* 1342.

[102] *Id.* 1348.

[103] *See* note 98 *supra.* The court in *Perlin* found "no requirement that the assistance offered by a Rule 6(e) 'disclosee' or a special assistant U.S. attorney must be technical in nature." 589 F.2d at 268. Although such a construction is possible on the face of the statute, the legislative history is sufficiently ambiguous and the implications sufficiently critical that, in this Comment's view, Congress should specify the range of agency personnel available to grand jury investigations and not leave such an issue entirely to the construction of the courts. The mere construction of rule 6(d) as excluding agency attorneys from presence in the grand jury proceedings would not necessarily resolve the problem because such attorneys could still be enlisted as assistants under rule 6(e)(2)(A)(ii), free to examine all grand jury records and transcripts outside the room. More important, given the Justice Department's need for them in some cases, the total exclusion of agency attorneys is neither feasible nor desirable. *See* text accompanying notes 142-43 *infra.* More stringent procedural safeguards tailored to the expanded risks posed by having agency attorneys conduct grand juries are needed.

[104] *Developments in the Law, supra* note 3, at 1315-16 n.29.

is more apt to detect and resist a significant diversion [105] if he remains responsible for conducting the questioning. Such diversionary probing would consume much of the United States attorney's time and effort; moreover, because he may also be less able to follow up on responses effectively, he may require frequent outside consultation with the agency assistant, taking up even more time. If, on the other hand, the practice of agency attorneys conducting grand juries without restriction gains acceptance, such attorneys may increasingly direct them without supervision,[106] and so be free to manipulate the questioning at will.

It is significant that several witnesses and congressmen participating in the legislative hearings on the 1977 amendments to rule 6(e) saw a distinct difference between agency assistance outside the grand jury room and agency presence inside the proceedings.[107] These spokesmen fully expected rule 6(d) to continue in force as a deliberate check on access of agency personnel to the grand jury room.

C. *Legislative History*

Indeed, the legislative history of those amendments, so heavily relied on by the courts, further cautions against blurring the distinction between agency access to materials and to the proceedings themselves. Neither the hearings held by the House Subcommittee on Criminal Justice,[108] its report,[109] nor the report of the Senate Committee on the Judiciary,[110] which produced the final version of the amendments, said anything about agency attorneys. Instead, they indicate that the drafters were extremely sensitive to the risks of any agency participation and meant to carve out a limited exception to the rule of grand jury secrecy. The version of rule 6(e) ultimately enacted was purposefully more detailed than the one originally submitted by the Supreme Court,[111] which the legislators did not believe contained a clear enough prohibition against misuse

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[105] *Id.* 1320.

[106] *See, e.g.*, United States v. Gold, 470 F. Supp. 1336, 1342 (N.D. Ill. 1979), in which the court indicates that an EPA attorney sometimes examined the witness alone and at other times assisted his coprosecutor from the Justice Department.

[107] *See* text accompanying notes 113-19 *infra.*

[108] *See* note 3 *supra.*

[109] H.R. REP. No. 95-195, 95th Cong., 1st Sess. (1977).

[110] S. REP. No. 95-354, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527.

[111] *See* note 6 *supra.*

and breach of secrecy.[112] Under such circumstances, it seems more appropriate to construe rule 6(e) strictly than to let expansive interpretation erode the safeguards already contained in rule 6(d).

Especially significant in this regard are Representative Holtzman's remarks aimed at clarifying the point that the proposed amendments were not intended to facilitate agency access to the grand jury room itself. In a question to Judge Becker, whose landmark opinions on agency assistance [113] were heavily relied on by the drafters, Representative Holtzman asked whether there might be an "unintentional corollary" to the amendment that would allow agency personnel to sit in on the grand jury proceedings. Judge Becker replied that rule 6(e) as amended did not accomplish this undesirable result and agreed that the point should be clarified.[114] He pointed out that the amended rule 6(e) was intended to allow government personnel to assist the United States attorney outside the grand jury room only.[115] Noting that the amendment emanated

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[112] S. REP. No. 95-354, 95th Cong., 1st Sess. 6, 8, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 532.

[113] Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976); *In re* William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971).

[114] The exchange was as follows:

> Ms. Holtzman: Let me ask you a question that counsel has brought to my attention. It is possible that there may be an unintentional corollary to the proposed amendment. By changing the definition of "attorney for the Government," it may now be possible for IRS agents or SEC agents to sit in when the grand jury hears a witness.
>
> Is that something that is desirable?
>
> Judge Becker: That is certainly not desirable. I don't think that the amendment accomplishes that. The amendment says "disclosure of matters occurring before the grand jury." It talks about to whom disclosure may be made. I don't have the rules here.
>
> I think there is another subdivision of rule 6 which says who can be in the grand jury.
>
> Ms. Holtzman: That is right. Subsection d of rule 6 says who may be present. It says attorneys for the Government, the witness under examination, and so forth may be present while the grand jury is in session.
>
> Judge Becker: I think that ought to be clarified.
>
> Ms. Holtzman: It would be your opinion that it would be undesirable to have IRS agents, handwriting experts, SEC personnel and the like in the grand jury room.
>
> Judge Becker: I think they should not be permitted in the grand jury room.
>
> Ms. Holtzman: And that ought to be clarified.
>
> Judge Becker: I think it should.

Hearings, supra note 3, at 39-40 (testimony of Hon. Edward R. Becker).

[115] *Id.* 40-41.

from his decision in *In re William H. Pflaumer & Sons, Inc.*,[116] a case solely concerning help outside the grand jury room, he said that presence in the grand jury room is governed by rule 6(d).

> I think that by virtue of the juxtaposition of (e) and [(d)] . . . that it should be made crystal clear that these people cannot be inside the grand jury room.
>
> . . . [T]he purpose of the amendment is to permit analysis and evaluation of material which is subpenaed [*sic*] to the grand jury, and that is outside the grand jury room.[117]

Wayne R. LaFave, reporter to the Advisory Committee on Criminal Rules, which had drafted the original Supreme Court proposals, added that the amendment could not change the restricted category of the people who may be present in the grand jury room:

> That was not the intention and I don't believe that would be a fair interpretation of the added language because it [the Advisory Committee's version of the amendment[118]] says for the purpose of this subdivision, which is subdivision (e) only.
>
> I don't think there is anything in the new language that in any way could be read as enlarging the group of people who may be physically present in the grand jury room.[119]

In neither of these dialogues was consideration given to the wisdom or propriety of an agency attorney being specially appointed to conduct a grand jury; instead, the speakers were objecting to the possibility of IRS agents or SEC investigators being permitted to sit in on grand jury proceedings. Although it does not evitably follow, it seems conceivable that these spokesmen would have objected even more strenuously to the possibility of the agency attorney actually conducting the proceeding. Indeed, neither the House nor Senate committees had an opportunity to comment on the decisions, beginning with *General Motors,* that debated the propriety of that practice, because the Sixth Circuit's initial opinion in that case had not yet been handed down.

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[116] 53 F.R.D. 464 (E.D. Pa. 1971).

[117] *Hearings, supra* note 3, at 41 (testimony of Hon. Edward R. Becker).

[118] *See* note 6 *supra.*

[119] *Id.* 90 (testimony of Wayne R. LaFave). Representative Holtzman replied, "I am glad to get assurance on the record that that was not the intention." *Id.*

The Senate draftsmen worked closely[120] with the House subcommittee members in revising the proposal and fashioning rule 6(e) as it was ultimately enacted. In light of this collaboration, the express disapproval in the House hearings[121] of the presence of agency personnel in the grand jury room strongly suggests that rule 6(e)'s amendment was not intended to affect rule 6(d) nor facilitate the presence of agency lawyers.[122]

IV. The Appointment Power Under Section 515(a)

Establishing that the amendments to rule 6(e) were not intended to affect rule 6(d) does not solve the problem of who may statutorily be present in the grand jury room. There remains the need to reconcile, on the one hand, 28 U.S.C. § 515(a),[123] enacted in 1906 and permitting appointment of special assistants to conduct grand juries, with, on the other hand, the policy of grand jury secrecy codified in rule 6(d), sharply restricting who can attend grand jury proceedings. Neither provision addresses agency lawyers expressly. If agency attorneys can be appointed under section 515(a) to conduct grand juries, then questioning their presence in the grand jury room might seem pointless. Even the court in *Perlin* conceded, however, that despite that section's broad language, there were "limitations on that power unexpressed in the

120 123 Cong. Rec. H7866-67 (daily ed. July 27, 1977) (remarks of Rep. Mann).

121 *See* text accompanying notes 113-19 *supra*.

122 Given the alarm with which the proposal merely to use agency personnel outside the grand jury room was viewed by corporate and civil liberties lawyers alike, *see, e.g., Hearings, supra* note 3, at 23 (testimony of Terry Philip Segal); *id.* 152 (testimony of Bernard J. Nussbaum); *id.* 181 (statement of Phylis Bamberger); *id.* 194 (testimony of Prof. Leon Friedman), Congress surely had good reason to doubt the advisability of opening grand jury rooms to agency personnel. Indeed, the most recent case to involve an agency attorney presiding over a grand jury, United States v. Gold, 470 F. Supp. 1366 (N.D. Ill. 1979), suggests that agency sensitivity to grand jury secrecy has not improved in response to the rule 6(e) amendments. For a more detailed discussion of *Gold* and its implications, see notes 157-58 & 170-74 *infra* & accompanying text. It is important to note that the case involved neither the IRS nor the SEC, two agencies with which Congress seemed particularly concerned. *See* text following note 119 *supra*. The case thus demonstrates that, although Congress may have focused on admitting IRS and SEC investigators to grand juries, it in fact gave access to all agencies.

123 The statute reads:

> a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

28 U.S.C. § 515(a) (1976).

statute." [124] That court should have seen the policy of grand jury secrecy as one such limitation.

A. *The* Perlin *View*

Rule 6(d) allows "attorneys for the government" to be present at the grand jury, and rule 54(c) defines that phrase as the "Attorney General, an authorized assistant of the Attorney General, a United States Attorney, [and] an authorized assistant of a United States Attorney." [125] Several courts have held in the past that this category of "attorneys for the government" does not include agency lawyers.[126] "The term 'attorneys for the government' is restrictive in its application. . . . If it had been intended that the attorneys for administrative agencies were to have free access to matters occurring before a grand jury, the rule would have so provided." [127] However, these cases did not deal directly with agency attorneys appointed specially under 28 U.S.C. § 515(a). The court in *Perlin* thus held that an agency lawyer appointed a special attorney was an "attorney for the government" for purposes of rule 6.[128] The court did not mention rule 54(c), but apparently concluded that such special attorneys fit the description of "authorized assistants of a United States Attorney." The problem with such a construction is that neither the plain meaning of the words nor the 1906 legislative history suggests that section 515(a) should enable all federal agencies to gain entrance to grand jury proceedings, thereby overriding the deliberate limitations on agencies' investigative powers which Congress has spelled out elsewhere.[129] An examination of this legislative history is thus necessary to refute the *Perlin* view.

B. *Special Assistants: Legislative History*

By at least 1903 it had become the practice of the Attorney General to employ special counsel to assist district attorneys.[130] In 1903, however, the Circuit Court of the Southern District of

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[124] 589 F.2d 260, 266 (7th Cir. 1978).

[125] FED. R. CRIM. P. 6(d) & 54(c).

[126] *See In re* Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962); *In re* Grand Jury Investigation, 414 F. Supp. 74 (S.D.N.Y. 1976); United States v. Daneals, 370 F. Supp. 1289 (W.D.N.Y. 1974).

[127] *In re* Grand Jury Proceedings, 309 F.2d 440, 443 (3d Cir. 1962).

[128] 589 F.2d at 266.

[129] *See* Note, *supra* note 36A, at 178-79.

[130] H.R. REP. No. 2901, 59th Cong., 1st Sess. 1 (1906).

New York held in *United States v. Rosenthal*[131] that the existing statutes did not permit this practice. In that case a special assistant was appointed and hired (for uncertain compensation) to conduct an investigation of alleged fraudulent importation of Japanese silks at the port of New York.[132] The assistant apparently had never before been employed by the federal government in a capacity at all analogous to agency lawyers; rather, he was simply acquainted with the facts of the particular case.[133]

Congress adopted 28 U.S.C. § 515(a) in response to the *Rosenthal* decision.[134] The Attorney General was granted the power to appoint special counsel "who is specially or particularly qualified by reason of his peculiar knowledge and skill to properly present to the grand jury the questions being considered by it."[135] The committee rebutted the only argument against permitting this power that it considered. "[I]t is no argument against it that some grand jury may be, perhaps, unduly influenced by the demands or importunities that may be made upon it by such special counsel. The same argument can as well be made against permitting a district attorney from attending a sitting of such jury."[136]

The legislative history simply does not address the particular problem considered by this Comment. Although the Attorney General may appoint special counsel with special skills, this statute was drafted to overturn a case that forbade the appointment of a *private* attorney and seemed to hold that no such appointments were permissible. The statute does not address, nor did its drafters ever consider, the special problems posed by allowing the appointment of agency lawyers as special assistants.

Judges have generally interpreted section 515(a) broadly in the government's favor, and it now seems established, after *In re Persico*,[137] that the Attorney General can appoint anyone in the Justice Department as a special attorney to assist local district attorneys.[138] No cases under section 515(a), however, had ever di-

131 121 F. 862 (C.C.S.D.N.Y. 1903).

132 *Id.* 863.

133 The assistant was evidently approached for advice by the Merchant's Association of the City of New York, the complainants, the month before his appointment. He was not their general counsel, however. *Id.* 863-64.

134 H.R. REP. No. 2901, 59th Cong., 1st Sess. 1 (1906).

135 *Id.* 2.

136 *Id.*

137 322 F.2d 41 (2d Cir. 1975).

138 *See* United States v. Morrison, 531 F.2d 1089 (1st Cir.), *cert. denied*, 429 U.S. 837 (1976); United States v. Wrigley, 520 F.2d 362 (8th Cir.), *cert. denied*, 423 U.S. 987 (1975).

rectly validated the appointment of lawyers from federal agencies other than the Justice Department for the purpose of conducting a grand jury until *In re Perlin*[139] and *United States v. Dondich*.[140] The reliance of those two decisions on *Persico* and its progeny is inapposite since the Justice Department is the one federal agency clearly intended by Congress to have access to the grand jury process. To extend unthinkingly such access to other federal agencies on the basis of section 515(a) is unwarranted both because the 1906 legislation was written long before the huge expansion in agency powers and because the more recent and complete evidence of congressional preference—the rule 6(e) hearings and reports—indicates agency involvement in grand jury investigations is to be strictly controlled.[141]

V. New Rules: Beginning Again

The better approach is to design new rules that directly address the use of agency lawyers to conduct grand juries. Because this practice entails added potential for abuse, such rules would impose even more stringent controls than those applied to technical assistance by rule 6(e). Such a scheme would still permit a United States attorney to tap an agency's legal talent when its special expertise was truly necessary to the success of a criminal investigation. Just as agency technical assistance is often necessary for the deciphering of grand jury materials,[142] so a United States attorney may sometimes be unable to gather or present evidence before a grand jury without the assistance of an agency lawyer. Very few regional United States attorneys' offices have personnel with the expertise to conduct a complex investigation of tax, securities, or environmental law. Some agency attorneys claim that in many cases, if the agency lawyers don't conduct the investigation, it won't be conducted at all.[143] The cost to the criminal justice system of totally excluding this expertise from the grand jury process would thus be significant.

A. *Lessons from Rule 6(e)*

Any rules designed to regulate the access of agency lawyers to the grand jury must be practical and effective unlike the cur-

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[139] 589 F.2d 260 (7th Cir. 1978).

[140] 460 F. Supp. 849 (N.D. Cal. 1978).

[141] *See* text accompanying notes 113-19, *supra*.

[142] *Hearings*, *supra* note 3, at 70-71 (statement of Acting Deputy Attorney General Richard L. Thornburgh).

[143] Interview with an agency lawyer (notes in possession of the author).

rent procedure of rule 6(e). As developed by the courts and Congress, the scheme posits a tight housekeeping system,[144] but provides inadequate enforcement procedures and remedies. If an agency lawyer has manipulated the grand jury process strictly for civil purposes and afterwards bothers to apply for a rule 6(e) order permitting subsequent use,[145] the application should be denied and the civil investigation perhaps halted, as the court in *Dondich*[146] suggested. However, this action is contingent on the civil defendant's ability to show evidence of the agency's bad faith to rebut the presumption of regularity of grand jury proceedings, a burden that is difficult to meet.[147] If granted an adversary hearing,[148] the challenger bears the burden of proof even though such proof will be entirely in the hands of the agency.[149]

Even absent bad faith, a great deal of information useful in a later civil proceeding may be obtained inadvertently by an agency lawyer from the grand jury investigation. If such information is routinely disclosed by judges under rule 6(e)(2)(C)(i), without a showing of "particularized need,"[150] then the distinction between administrative and criminal investigatory powers will be largely illusory. The scheme of subparagraph (C)(i) contemplating judicial consent for derivative use of grand jury evidence also does not sufficiently protect against the problem of sub silentio abuse.[151] It

144 Rule 6(e)(2)(B) provides in relevant part: "An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made." FED. R. CRIM. P. 6(e)(2)(B). Further housekeeping measures were suggested by Judge Becker in Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976).

145 FED. R. CRIM. P. 6(e)(2)(C)(i).

146 460 F. Supp. at 858.

147 *See* note 96 *supra* & accompanying text. One defense lawyer has asked, "How do you prove bad faith after the fact? How?" *Hearings, supra* note 3, at 158 (testimony of Bernard J. Nussbaum). The author of Note, *supra* note 5, describes the protections of the "good faith" rule as "illusory." *Id.* 311.

148 The framers of rule 6(e) did not make it clear that the challenger had this opportunity at all; instead they indicated that the hearings on requests for disclosure under subparagraph (2)(C)(i) should be *ex parte*. S. REP. No. 95-354, 95th Cong., 1st Sess. 8, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 532.

149 *Hearings, supra* note 3, at 158 (testimony of Bernard J. Nussbaum); *see* note 96 *supra*. A full discussion of the ambiguities surrounding applicable standards and opportunities for remedying abuses of rule 6(e) is beyond the scope of this Comment. The problem has been comprehensively treated in Note, *supra* note 5, at 325-26, which concludes that the current protections are inadequate and the burden of proving good faith should rest upon the government. It recommends that the judicial inquiry go beyond merely looking to see whether good faith prevailed at the time the grand jury was convened.

150 For an indication that this standard was intended by the framers of rule 6(e), but not necessarily followed by the courts, *see* Note, *supra* note 5, at 320-25.

151 *See* text accompanying notes 89-97 *supra*.

is unrealistic to assume that an agency lawyer will forget everything he has learned when he returns to his civil investigatory role. Without having to apply for release of grand jury materials, he will have formed suspicions and explored possible leads. In a subsequent civil proceeding or investigation, it will be difficult for the subject to quash an agency summons or suppress evidence by showing they resulted from attorney exposure to grand jury matters.[152]

These shortcomings suggest the difficulty of correcting abuses after the fact and the advisability of prophylactic measures designed to reduce the opportunities for such abuse in the first place. In drafting rule 6(e), Congress declined to adopt such a strategy, but the new practice of agency attorneys conducting grand jury investigations enlarges the scope of the risk beyond what Congress contemplated in 1977; thus, consideration of a sterner screening process for section 515(a) appointments is appropriate.

B. *New Rules*

Balancing the above considerations yields the following proposed rules based on the presumption that an agency lawyer should not be allowed into the grand jury room until all the rules are satisfied.

1. Showing of Need

Before accepting that an agency lawyer is necessary for the investigation of crime, a district judge should be satisfied that the United States attorney is unlikely to be effective alone. A judge should not accept this proposition if it appears that the United States attorney has little interest in the investigation, nor should he too easily accept a simple assertion of technical ignorance. Under rule 6(e) agency personnel are always available to explain the elements of the investigation to the United States attorney outside the grand jury room. Therefore, the requirement that the United States attorney, in the normal course of affairs, be the investigator need not be onerous. This "showing of need" requirement will in most cases screen out agency lawyers who are involved primarily

[152] The possibility of employing an independent source test was mentioned in Simplot v. United States Dist. Court, 77-1 U.S. Tax Cas. ¶ 9146, at 86,199, 39 A.F.T.R.2d 77-372 (9th Cir. 1976), *amended*, 40 A.F.T.R.2d 77-5001 (9th Cir. 1977), *withdrawn*, 77-2 U.S. Tax Cas. ¶ 9511 (9th Cir. 1977). The prophylactic effect of such a remedy is open to question, especially if, as one defense lawyer at the congressional hearings testified, judges show impatience with such motions: "The idea that they will give you a full hearing and that you will be able to prove what you think happened is extremely unlikely." *Hearings*, *supra* note 3, at 158 (testimony of Bernard J. Nussbaum).

to gather information they could not otherwise obtain. It is precisely that kind of curiosity which endangers grand jury secrecy.[153] Further, the burden of this requirement on the judge is not unrealistic: it is less demanding simply to test the need for one or two special assistants from agencies than to approve the use of all technical assistants (like handwriting analysts and accountants), a task of which judges were relieved under amended rule 6(e).[154]

The cost of such a rule in terms of criminal enforcement will depend partly upon the stringency with which it is applied. If the Justice Department is reluctant to prosecute cases without using special assistants from agencies to conduct proceedings before the grand jury, then the cost may be considerable: each time the United States attorney fails to convince a judge that the agency lawyer is needed, the investigation might be abandoned. This prospect is, however, somewhat speculative. It is unlikely that an agency expert could not instruct the United States attorney adequately and make evidence understandable to members of the jury by testifying on occasion as a sworn witness.[155]

A component of the showing of need is an investigation of good faith—that is, making sure the grand jury is convened for the legitimate purpose of investigating crimes. Such an investigation appears to have been made in *Perlin*,[156] but it was not made until well after the special attorney had been appointed. Further, it did not directly examine the need for the appointment of a special attorney.

A corollary of the showing of good faith would be a requirement that the Justice Department pay all expenses of the special

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153 It must be conceded that the effectiveness of this type of judicial control over ongoing investigations has been seriously questioned in the past, most notably in the context of warrants and wiretaps. *See, e.g.*, Miller & Tiffany, *Prosecutor Dominance of the Warrant Decision: A Study of Current Practices*, 1964 WASH. U. L.Q. 1, 13; Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169 (1969). Therefore, particular care should be taken to ensure that the court in this instance does not become a mere "rubber stamp" ratifying the prosecutor's decisions.

154 Such approval has been given by judges. *See* Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976). *See also Hearings, supra* note 3, at 30 (testimony of the Hon. Edward R. Becker) ("[I] am not so sure that you ought to implicate the judges every step of the way of it; this is a very complex area and potentially a very onerous area."). Of course, given the huge parade of technical experts who would have to be approved, the fears of overtaxing the courts were legitimate. These concerns, as has been noted, do not apply so strongly with respect to special assistants.

155 Rule 6(d) expressly allows witnesses "under examination" to be present in the grand jury room.

156 589 F.2d 260, 263 (7th Cir. 1978).

assistant related to his grand jury activities. Thus, the United States attorney may not be so agreeable to retaining an agency lawyer whose presence is not really necessary to the grand jury investigation, and the agency lawyer participating as an assistant may feel his loyalty to his agency is no longer undivided. Indeed, the problem of financial arrangements drew attention in *United States v. Gold*,[157] in which the assistant remained on his agency's payroll and had his plane fares paid for by the agency. Highlighting the problem, the Justice Department defended this arrangement by saying: "[The agency lawyer's] activities in support of the United States Attorney have been concerned strictly with the interests of EPA." [158]

2. Investigators Only

The danger of allowing a high-level agency lawyer into the grand jury room is that he will carry away with him information upon which he can initiate a subsequent civil investigation or perhaps make regulatory policy. Thus, any agency lawyers "in a position to control or even to take a substantial part in a decision about any action which the . . . [agency] may take upon the advice of the attorney," [159] should be barred from grand jury participation. By limiting the agency lawyers eligible to conduct grand juries to those who will not be able to instigate investigations or direct policy within the agency, this rule would allow agency personnel to conduct the grand jury while ensuring that they would not "tiptoe" [160] back to their agency to begin an investigation of what was said or suggested by a grand jury witness. Although any agency employee present at the grand jury hearing could report on the proceedings to his superiors, such disclosure would clearly violate rule 6(e) and the third of the proposed rules of this Comment if the reports went beyond general accounts of how the assistant was employed.[161]

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[157] 470 F. Supp. 1336 (N.D. Ill. 1979).

[158] *Id.* 1342.

[159] City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962). Use of this quotation deliberately borrows from cases which define the "control group" within a corporation for purposes of assigning attorney-client privilege. *See, e.g.*, Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968); Radiant Burners, Inc. v. American Gas Ass'n., 320 F.2d 314 (9th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963).

[160] *See* note 94 *supra* & accompanying text.

[161] Courts have been excessively lenient in letting grand jury assistants report to their agency superiors on their activities. *See In re* Grand Jury Subpoenas, April, 1978, at Baltimore, 581 F.2d 1103, 1109 n.14 (4th Cir. 1978), *cert. denied*, 99 S. Ct. 1533 (1979) (IRS agents filed reports with chief of Service's Intelligence Division; court held this permissible saying merely that chief was thereby brought within nondisclosure obligation of rule 6(e)); *accord, In re* Perlin, 589 F.2d 260, 269 (7th Cir. 1978).

3. Oath

Judge Becker has suggested that an oath be administered to potential disclosees.[162] Agency lawyers could easily be required to take a similar oath restraining them from subsequent disclosure or use of information learned in the grand jury room. This oath would bolster the contempt provision of rule 6(e)[163] by adding yet another duty of silence. Although the agency lawyer is unlikely to "fear that if he swears falsely he will go to hell,"[164] the solemnity of the procedure and the possible consequences of violating a guarantee of nondisclosure are likely to have a strong deterrent effect on an attorney. Rather than risk violating this oath, an agency lawyer might be more careful to avoid involvement with any investigations by his agency of any of the grand jury witnesses.

4. Reveal Identity

The administrative agency lawyer must be required to reveal the identity of his real employer, the agency, and also his own name to each grand jury witness. Only by knowing about the participation of the agency lawyer in the grand jury can a witness be alert to possible abuse or tainted evidence when he is later the subject of an agency investigation. There is evidence that some agency attorneys already do disclose their affiliation to the witnesses.[165] This practice should be mandatory.

5. Issue a Protective Order

If the appointment of a lower-level agency lawyer as a special attorney is deemed necessary to the conduct of a grand jury investigation, the judge should give his consent subject to a protective order barring that attorney from any role in concurrent or shortly subsequent civil litigation or regulatory activity undertaken by his agency involving grand jury witnesses or targets. Such a protective order need not be permanent but should remain in effect long

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[162] *Hearings, supra* note 1, at 31 (testimony of Hon. Edward R. Becker).

[163] FED. R. CRIM. P. 6(e)(1).

[164] Final Report of the Committee on Supreme Court Practice and Procedure, Presented by the Lord High Chancellor to Parliament (1953), *quoted in* J. MAGUIRE, J. WEINSTEIN, J. CHADBOURN & J. MANSFIELD, CASES AND MATERIALS ON EVIDENCE 2 (1973).

[165] United States v. Birdman, No. 78-1940 (3d Cir. June 25, 1979). It is too late to object that awareness of agency presence will cause the witness to withhold useful testimony from the grand jury for fear of its civil implication. That was an argument for not allowing agency assistance in the first place because it reduces grand jury secrecy and thus inhibits witnesses. Once such assistance becomes routine, the chilling effect on witnesses is inevitable, and the requirement that agency attorneys disclose their identity seems harmless and fundamentally fair.

enough so that the evidence acquired by exposure to the grand jury proceedings may have grown stale, or, at least, the incentive to exploit it may have diminished. It is currently the practice for agency lawyers to request benevolent protective orders before the grand jury begins by which they hope to eviscerate any successful challenges by grand jury witnesses or targets to the agency lawyers' presence.[166] The protective orders generally follow rule 6(e) (2)(B), forbidding the use of information developed in the grand jury in subsequent civil proceedings.[167] Alone, these are clearly inadequate to protect against sub silentio or inadvertent use of grand jury information. Although they may have effect in conjunction with the other proposed rules, the better rule is to forestall the likelihood of abuse by making an affirmative order that for a specified period of time, the agency lawyer have no further agency responsibility in matters regarding the grand jury witnesses.[168]

Of the proposed rules, the protective order is the most "costly" in terms of restrictions on agency activity. Yet the IRS has just revised its manual to include such a prophylactic measure. Part 9267.3(3) states that "service personnel who have received grand jury information that is subject to the secrecy provisions of Rule 6(e) shall, exclude themselves from involvement in non-grand jury matters concerning the individuals, entities, and subject matter of the grand jury information." [169] This provision applies to Service employees at the highest level of management. Such a rule may be less feasible in smaller agencies with less manpower or where a regulated industry is highly concentrated. For example, to bar the lawyer from dealing with companies representing a significant proportion of his field of expertise (for example, one of the major car manufacturers) would be too costly for the agency and would probably result in the agency's refusal to lend the lawyer to a grand jury investigation involving that manufacturer. In such a situation, protective orders such as those currently issued, which merely forbid subsequent use of the information, might be more appropriate.

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[166] Interview with an assistant United States attorney (notes in the possession of the author). Such challenges may be based on *In re* Perlin, 589 F.2d 260 (7th Cir. 1978), and *In re* April 1977 Grand Jury Subpoenas, 573 F.2d 936, *rev'd en banc*, 584 F.2d 1366 (6th Cir. 1978), *cert. denied*, 99 S. Ct. 1277 (1979).

[167] FED. R. CRIM. P. 6(e)(2)(B).

[168] Such a protective order was sorely needed in United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979). During the grand jury investigation, the special assistant to the prosecutor continued to perform functions at EPA affecting the regulation and administrative investigations of Velsicol, the company under investigation by the grand jury.

[169] [1979] 5 INTERNAL REVENUE MANUAL (CCH) pt. 9267.3(3).

Still, the need for some protective order is clearly evident in *United States v. Gold*,[170] in which the EPA attorney, Kennedy, demonstrated the precise kind of insensitivity to the basic distinctions between agency powers of investigation and those of a grand jury[171] that requires this rethinking of the policy of access to the grand jury. In several instances, grand jury evidence was used in concurrent parallel EPA hearings. For example, Kennedy, who had actively conducted the examination of witnesses, collaborated with his agency associates to formulate the theory that was used by the EPA administrator to reverse the decision of the administrative law judge. Kennedy never told the Justice Department of this involvement.[172] Further, Kennedy disclosed to his EPA supervisor the contents of certain incriminating telephone transcripts that he had obtained pursuant to a grand jury subpoena. This disclosure was not sanctioned by any court.[173] Even after obtaining on another occasion a court order allowing disclosure to EPA of a document uncovered by the grand jury, Kennedy continued the abuse by revealing it instead to the administrative law judge conducting the hearing.[174] These examples underscore the need to limit agency access to grand juries and subsequent use of information there obtained.

VI. Conclusion

The current practice of allowing agency lawyers to conduct grand jury investigations has been allowed to continue because courts have misread or misunderstood the purpose and legislative histories of the 1977 amendments to rule 6(e), providing for access to grand jury materials, and 28 U.S.C. § 515(a), providing for the appointment of special assistants to the United States attorney. Courts have failed to reconcile satisfactorily their broad interpretation of section 515(a) with the deliberate limitations on access to grand jury proceedings contained in rule 6(d). Admittedly, the two sections do not on their faces contradict each other, but no court has yet addressed the serious expansion of agency powers which their casual statutory construction implies. As the use of agency lawyers to conduct grand juries gains acceptance in the

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[170] 470 F. Supp. 1336 (N.D. Ill. 1979).

[171] *See* text accompanying notes 22-31 *supra*.

[172] 470 F. Supp. at 1347.

[173] Findings of Fact at 63 (No. 77-CR-1073) (unpublished).

[174] 470 F. Supp. at 1350-51.

wake of decisions such as *In re Perlin*,[175] *United States v. Dondich*,[176] and *United States v. Birdman*,[177] the benefits of the grand jury's powerful investigative processes may increasingly accrue to federal agencies which can exert influence to broaden the grand jury inquiry beyond the scope of criminal activities and later, intentionally or inadvertently, use advantageously what was learned in their civil investigations or administrative regulation. This is contrary to the long-standing policy of grand jury secrecy and inconsistent with the statutory scheme enacted by Congress to distinguish administrative investigatory powers from those used to investigate crime.

If agency lawyers are to be allowed into the grand jury room, they should first be screened by a district judge, who should require the following:

1. A showing that the agency lawyer is truly needed;

2. A showing that the agency lawyer is not a member of the "control group" of the agency;

3. An oath that all testimony heard will remain secret;

4. A procedure by which the agency lawyer will reveal his usual employment to each witness; and

5. That the agency abide by a protective order which should temporarily bar involvement by the agency lawyer in civil actions or regulation regarding the grand jury witnesses, or, alternatively, barring subsequent use of any grand jury testimony.

The imposition of the suggested rules would provide a satisfactory prophylaxis to grand jury abuse while allowing government resources to be used efficiently.

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[175] 589 F.2d 260 (7th Cir. 1978).

[176] 460 F. Supp. 849 (N.D. Cal. 1978).

[177] No. 78-1940 (3d Cir. June 25, 1979).